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KABUSHIKI KAISHA NGU v. LEISURE FARM CORPORATION SDN BHD & ORS

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
SURIYADI HALIM OMAR FCJ
B ABU SAMAH NORDIN FCJ
RAMLY ALI FCJ
AZIAH ALI FCJ
[CIVIL APPEAL NO: 02(f)-82-11-2015(W)]
2 AUGUST 2016

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CIVIL PROCEDURE: *Appeal – Procedure – Cross-appeal – Whether notice of cross-appeal provides for complaint to be re-heard – Whether separate notice of appeal should be filed under r. 5 of Rules of the Court of Appeal 1994 – Whether r. 8(1) of Rules of the Court of Appeal 1994 limits contentions under notice of cross-*
D *appeal to effectively vary decision – Whether aggrieved party at liberty to file independent appeal under s. 67(1) of the Courts of Judicature Act 1964*

WORDS & PHRASES: *'vary' – 'decision of the High Court should be varied' – Rules of the Court of Appeal 1994, r. 8 – Whether ought to be given its ordinary and natural meaning – 'change, make differently, modify' – Whether operative*
E *words clearly limits contentions under a notice of cross-appeal to effectively vary decision and not to set aside judgment or order*

This was an appeal by the first defendant arising from the Court of Appeal's ruling in allowing the plaintiff's preliminary objection that the first
F defendant's notice of cross-appeal ('notice of cross-appeal') should be restricted to vary that part of the order that was being appealed by the plaintiff and not be permitted to seek to reverse any other aspects of the decision of the High Court. The plaintiff's appeal was only against part of the judgment of the High Court in granting damages *in lieu* of specific performance despite holding that the plaintiff had proven its case that there
G was a valid and binding contract entered into with the first defendant for the sale and purchase of a piece of property. Before the Court of Appeal, the plaintiff had sought for an order to reverse the order for damages granted *in lieu* of specific performance by the High Court and to obtain an order for specific performance of the agreement reflected in the Hong Kong
H memorandum ('the HK MOU') for the purchase of the golf course land. It was the plaintiff's contention that the order of specific performance ought to be granted in light of the fact that the High Court had rightly found that the HK MOU constituted a valid and binding contract between the plaintiff and the first defendant. The Federal Court granted leave to the first defendant to
I appeal on the following questions of law (i) whether a notice of cross-appeal under the Rules of the Court of Appeal 1994 ('RCA 1994') was to be limited in the issues or the scope of issues it may raise; (ii) whether a respondent could be precluded from raising an issue by notice of cross-appeal on the

ground that it was open to him to independently appeal on the issue; and (iii) whether it was open to the respondent to appeal over an issue which did not form part of the order made by the High Court but comprised one of the reasons for its decision in favour of the appellant.

Held (dismissing appeal with costs)
Per Zulkefli Ahmad Makinudin CJ (Malaya) delivering the judgment of the court:

(1) In construing r. 8 and Form 2 of the RCA 1994, the Court of Appeal had rightly considered the critical words used, namely 'should be varied ... specifying the grounds thereof' and 'to be varied to the extent'. Following this, the Court of Appeal had rightly held that the word 'vary' by itself should be given its ordinary and natural meaning to mean 'change, make differently, modify'. This court also agreed with the Court of Appeal's finding that it had considered the clear provisions under r. 5 of the RCA 1994, and held that r. 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal was by way of a re-hearing. The word "re-hearing" anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence, if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal. (paras 15 & 16)

(2) The first defendant was entitled to have a 're-hearing' of the case before the Court of Appeal by way of a notice of appeal. Given the fact that the first defendant had not filed a separate notice of appeal, the plaintiff therefore had rightly raised a preliminary objection against the first defendant's cross-appeal which was recast as an appeal to set aside the judgment of the High Court. On the second and third questions posed before this court, the first defendant ought to have filed an independent notice of appeal as a notice of cross-appeal does not provide for a complaint to be re-heard. (paras 21 & 22)

(3) The first defendant had failed to appeal against the finding of the High Court that the HK MOU was a binding contract. The High Court's decision that there was a valid and binding agreement concluded between the plaintiff and the first defendant was adverse against the first defendant. It was thus incumbent on the first defendant to file a separate notice of appeal if it wanted the aforesaid decision to be reversed or set aside, rather than by filing a notice of cross-appeal. The operative words of 'to contend' and 'decision of the High Court should be varied' under r. 8(1) of the RCA 1994 limits the contentions under a notice of cross-appeal to effectively vary a decision, not set aside a judgment or order. It was incumbent on the first defendant to independently file a notice of appeal under r. 5 of the RCA 1994 to rehear the issues that were not

A decided in the first defendant's favour. A notice of cross-appeal does not provide for a complaint to be re-heard. The first defendant was at liberty to file an independent appeal under s. 67(1) of the Courts of Judicature Act 1964. (para 36)

Bahasa Malaysia *Headnotes*

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Ini adalah rayuan defendan pertama yang berbangkit daripada keputusan Mahkamah Rayuan yang membenarkan bantahan awal plaintif bahawa notis rayuan balas defendan pertama ('notis rayuan balas') harus dihadkan untuk mengubah bahagian perintah yang dirayu oleh plaintif dan tidak dibenarkan menuntut atau menukar mana-mana aspek keputusan Mahkamah Tinggi. Rayuan plaintif hanyalah terhadap penghakiman Mahkamah Tinggi yang telah membenarkan ganti rugi sebagai ganti pelaksanaan spesifik walaupun memutuskan bahawa plaintif telah membuktikan terdapatnya kontrak yang sah dan mengikat yang dimasuki oleh defendan pertama untuk penjualan sebuah hartanah. Di hadapan Mahkamah Rayuan, plaintif menuntut perintah untuk menukar perintah ganti rugi yang diberikan sebagai ganti pelaksanaan spesifik oleh Mahkamah Tinggi dan untuk memperolehi perintah pelaksanaan spesifik persetujuan yang dicerminkan dalam memorandum Hong Kong ('MOU HK') untuk hartanah tersebut. Adalah hujahan plaintif bahawa perintah pelaksanaan spesifik harus diberikan memandangkan fakta bahawa Mahkamah Tinggi telah dengan betul mendapati MOU HM merupakan kontrak yang sah dan mengikat antara plaintif dan defendan pertama. Mahkamah Persekutuan memberikan kebenaran kepada defendan pertama untuk merayu atas persoalan-persoalan undang-undang (i) sama ada notis rayuan balas di bawah Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') harus dihadkan kepada isu-isu atau skop isu-isu yang boleh dibangkitkan; (ii) sama ada responden dikecualikan daripada membangkitkan isu melalui notis rayuan balas atas alasan ia adalah terbuka kepadanya untuk membuat rayuan berasingan bagi isu itu; dan (iii) sama ada terbuka kepada responden untuk merayu berkenaan isu yang tidak dijadikan sebahagian perintah yang dibuat oleh Mahkamah Tinggi tetapi termasuk salah satu sebab untuk keputusannya memihak kepada perayu.

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Diputuskan (menolak rayuan dengan kos)

Oleh Zulkefli Ahmad Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

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(1) Dalam mentafsirkan k. 8 dan Borang 2 KMR 1994, Mahkamah Rayuan telah dengan betulnya mempertimbangkan kata-kata kritikal yang digunakan, iaitu 'should be varied ... specifying the grounds thereof' dan 'to be varied to the extent'. Berikutan ini, Mahkamah Rayuan telah dengan betul memutuskan bahawa perkataan 'vary' secara sendiri harus diberikan maksud biasa dan semulajadi iaitu 'change, make differently, modify'. Mahkamah ini juga bersetuju dengan dapatan Mahkamah Rayuan bahawa ia telah mempertimbangkan peruntukan-peruntukan

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jelas di bawah k. 5 KMR 1994, dan memutuskan bahawa k. 5 KMR 1994 memperuntukkan bahawa rayuan hendaklah dikemukakan terhadap keseluruhan atau sebahagian daripada mana-mana penghakiman atau perintah mahkamah, dan rayuan sebegitu adalah berbeza dengan rayuan balas melalui pendengaran semula. Perkataan 'pendengaran semula' yang digunakan jelas menjangkakan semakan semula atau luahan di hadapan mahkamah rayuan berkenaan semua hujahan-hujahan yang diambil dari mahkamah bawahan. Oleh itu, jika tujuan adalah untuk menyerang dapatan substantif mahkamah, ia harus mengingatkan kepada pihak yang terkilan untuk memfailkan notis rayuan yang sesuai.

(2) Defendan pertama berhak mendapatkan 're-hearing' kes di hadapan Mahkamah Rayuan melalui notis rayuan. Memandangkan defendan pertama tidak memfailkan notis rayuan berasingan, plaintif oleh itu telah dengan betul membangkitkan bantahan awal terhadap rayuan balas defendan pertama yang diubah suai sebagai rayuan bagi mengetepikan penghakiman Mahkamah Tinggi. Berkenaan persoalan kedua dan ketiga yang dikemukakan, defendan pertama harus memfailkan notis rayuan berasingan kerana notis rayuan balas tidak memperuntukkan bahawa aduan boleh didengar semula.

(3) Defendan pertama gagal untuk merayu terhadap dapatan Mahkamah Tinggi bahawa MOU HK adalah kontrak mengikat. Keputusan Mahkamah Tinggi bahawa terdapat persetujuan yang sah dan mengikat di antara plaintif dan defendan pertama adalah bertentangan dengan defendan pertama. Adalah wajib bagi defendan pertama memfailkan notis rayuan berbeza jika ia ingin keputusan itu ditukar atau diketepikan, bukannya memfailkan notis rayuan balas. Kata-kata operatif 'to contend' dan 'decision of the High Court should be varied' di bawah k. 8(1) KMR 1994 dengan jelasnya menghadkan pendirian di bawah notis rayuan balas untuk secara berkesan mengubah keputusan, bukan untuk mengetepikan penghakiman atau perintah. Adalah wajib untuk defendan pertama memfailkan notis rayuan secara berasingan di bawah k. 5 KMR 1994 untuk mendengar semula isu-isu yang diputuskan tidak memihak kepada defendan pertama. Notis rayuan balas tidak memperuntukkan aduan boleh didengar semula. Defendan pertama bebas untuk memfailkan rayuan berasingan di bawah s. 67(1) Akta Mahkamah Kehakiman 1964.

Case(s) referred to:

Alati v. Kruger – BC5500350 (Unreported) ***(refd)***
In re Parker (Deceased) Crow v. Weston [1948] NZLR 9 ***(refd)***
Pengerusi Suruhanjaya Pilihanraya Malaysia v. See Chee How & Anor [2015] 8 CLJ 367 CA ***(refd)***
Re Cavender's Trusts (1881) 16 Ch D 270 ***(refd)***
Rex v. Lee Ah Phua & Ors [1950] 1 LNS 74 HC ***(refd)***

A *Sumarni v. Yow Bing Kwong & Anor [2008] 3 CLJ 489 CA* ***(dist)***
Vadlamudi VenkateswaHu & Anor v. Ravipati Ramamma & Anor AIR 1950 MAD 379 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 67(1)
B Rules of Court 2012, O. 55 r. 8
Rules of the Court of Appeal 1994, rr. 5(2), (4), 7, 8(1), 9, 10, 17
Rules of the High Court 1980, O. 53 r. 3

For the appellant - Cyrus Das & Ong Chee Kwan; M/s Christopher & Lee Ong
For the 1st respondent - Cecil WM Abraham, Rishwant Singh & Esther Yee; M/s Cecil Abraham & Partners
C *For the 2nd respondent - Ang Hean Leng; M/s Lee Hishammuddin Allen & Gledhill*
For the 3rd respondent - Malik Imtiaz Sarwar, Mathew Thomas Philip, Tan Jee Tjun & Aaron Chelliah; M/s Thomas Philip

[Editor's note: For the Court of Appeal judgment, please see Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors [2015] 3 CLJ 489 (affirmed).]

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Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Ahmad Makinudin CJ (Malaya):

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Introduction

[1] The appellant was the first defendant and the first respondent was the plaintiff before the High Court. Also before the High Court the second respondent was the second defendant and the third respondent was the third
F defendant. We shall refer to the parties as they were before the High Court.

[2] This is an appeal by the first defendant arising from the Court of Appeal's ruling in allowing the plaintiff's preliminary objection that the first defendant's notice of cross-appeal dated 15 April 2014 ("notice of cross-appeal") should be restricted to vary that part of the order that was being
G appealed by the plaintiff and not be permitted to seek to reverse any other aspects of the decision of the High Court. The plaintiff's appeal was only against part of the judgment of the High Court on 11 March 2014 in granting damages *in lieu* of specific performance despite holding that the plaintiff had proven its case that there was a valid and binding contract entered into with
H the first defendant for the sale and purchase of the golf course land and the memberships therein. The Court of Appeal also noted that if the first defendant intends to reverse the entire decision of the High Court, then the first defendant ought to have filed a notice of appeal against the order of the High Court within the time limited to file an appeal.

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[3] Before the Court of Appeal the plaintiff as the appellant had sought for an order to reverse the order for damages granted *in lieu* of specific performance by the High Court and to obtain an order for specific performance of the agreement reflected in the Hong Kong memorandum dated 16 March 2012 ("the HK MOU") for the purchase of the golf course land.

[4] It is the plaintiff's contention that the order of specific performance ought to be granted in light of the fact that the High Court had rightly found that the HK MOU constituted a valid and binding contract between the plaintiff and the first defendant for the sale and purchase of the golf course land and the memberships therein.

[5] The Federal Court on 8 October 2015 granted leave to the first defendant to appeal on the following questions of law:

(1) whether a notice of cross-appeal under Rules of the Court of Appeal 1994 ("RCA 1994") is to be limited in the issues or the scope of issues it may raise?;

(2) whether a respondent can be precluded from raising an issue by notice of cross-appeal on the ground that it was open to him to independently appeal on the issue?; and

(3) whether it was opened to the respondent to appeal over an issue which did not form part of the order made by the High Court but comprised one of the reasons for its decision in favour of the appellant?

[6] It is noted that the second and the third defendants made no submissions and were not heard in the course of submissions in the Court of Appeal. We took it that they were not affected by the objection taken by the plaintiff as to the scope of the notice of cross-appeal filed by the first defendant. As there is no appeal or cross-appeal before the Court of Appeal and having chosen not to be heard, the second and the third defendants should, therefore, not be heard here in the Federal Court.

Background Facts

[7] The relevant background facts of the case are these. In 2011 and leading up to 16 March 2012, Sugiki, the President of the first defendant, negotiated on behalf of the first and second defendants for the sale of property known as the golf course land to the plaintiff. The first defendant owns all the shares in the second defendant. The second defendant owns the golf course, including the golf course land.

[8] On 31 May 2012 and 4 June 2012 the plaintiff entered private caveats over the golf course land ("the private caveats"). On 11 July 2012 the plaintiff filed a suit in the High Court against the first defendant for specific performance of the sale and purchase agreement pertaining to the sale and

purchase of the entire issued shares in the second defendant. On 25 July 2012 the second defendant granted the third defendant an option to purchase part of the golf course land. On 11 September 2012 the first and third defendants entered into a sale and purchase agreement ("the Walker SPA") to purchase part of the golf course land. A 10% deposit was paid. On 19 September 2012 the plaintiff obtained before the High Court an injunction restraining the first and second defendants from dealing with the golf course land. An *inter partes* injunction was granted on 7 November 2012. On 11 January 2013 the third defendant intervened in the High Court suit and filed a counterclaim seeking a declaration that the plaintiff has no caveatable interest over the golf course land.

Findings Of The High Court

[9] The High Court *inter alia* found that:

(a) There was a sale and purchase agreement between the plaintiff and the first defendant and the golf course land was the subject of the agreement;

(b) The second and third defendants were aware of the sale and purchase agreement of the first defendant and the plaintiff. The third defendant was therefore not a *bona fide* purchaser for value without notice;

(c) The first defendant owned all the shares in the second defendant. The first defendant agreed to sell all its shares in the second defendant to the plaintiff;

(d) The sole asset of the second defendant was the golf course land. The golf course land affected the pricing of the shares;

(e) The intention of the parties' right from the outset of the sale transaction was the purchase of the golf course land;

(f) The third defendant was aware of the plaintiff's interest in the golf course land by virtue of the entry of the caveats. This was also stated in the third defendant's Walker SPA.

Decision Of The Court Of Appeal

[10] In respect of the plaintiff's preliminary objection against the first defendant's notice of cross-appeal, the Court of Appeal amongst others held that:

(a) The operative words in r. 8 of the RCA 1994 and Form 2 are "should be varied … specifying the grounds thereof" and "to be varied to the extent" do not carry with them a meaning that there could be a total or wholesale setting aside or review of the substantive judgment or any findings of the court by way of a re-hearing under r. 5 of the RCA 1994.

(b) The extent of any contention under a cross-appeal is to be limited to a modification or some slight difference to be made to that part only of the judgment appealed against. This is borne out by the terminology

used - "… varied to the extent …" clearly pointing to a limitation of sorts in the scope of the matters to be advanced by way of the cross-appeal, that is, those words being given an ordinary and natural reading.

(c) This is consistent with the scheme of things envisaged under r. 5 of the RCA 1994 which provides for an appeal to be lodged against the whole or part of any judgment or order of court and such an appeal (in contrast to a cross-appeal) is by a re-hearing. The word "re-hearing" used here clearly anticipates a review or regurgitation before the appellate court of all the points and arguments taken at the court below. Hence if it is the substantive finding of the court that is intended to be attacked, it behoves upon the party aggrieved to file a proper notice of appeal.

(d) The plaintiff being satisfied as to the finding of fact that there was a binding contract but dissatisfied that no specific performance had been ordered was appealing only against a part of the judgment, namely that the court ought to have in all the circumstances allowed the relief of an order of specific performance of the contract rather than that damages *in lieu* thereof be recovered from the first defendant. Given that was the scope of the appeal itself, any cross-appeal by the first defendant that could be pursued was necessarily limited, as to the dissatisfaction with the damages *in lieu* (to be assessed), the further damages in the sum of RM841,691.94 and costs of RM150,000 ordered against the defendant.

(e) The effect sought by way of the first defendant's cross-appeal was to set aside the finding of court that there was a "concluded contract". This could only be pursued by the first defendant by filing a proper and separate notice of appeal within the one month allowed for an appeal to be lodged. Accordingly, the first defendant was precluded in the course of advancing their cross-appeal from raising any argument that there was no valid and concluded contract as held by the judge.

Decision Of This Court

[11] The issues raised in this appeal involve the interpretation and application of the provisions under rr. 5, 7, 8, 9 and 10 of the RCA 1994. It is the first defendant's contention that the Court of Appeal had taken too narrow a view of the efficacy of the cross-appeal. The purpose of the cross-appeal is to have all complaints over the judgment under appeal to be heard together as a time and cost-saving exercise. It is also to ensure that all matters relating to the judgment are disposed of by the same appellate court.

[12] It is also the submission of the first defendant that the interpretation of the above mentioned rules of the RCA 1994 would themselves demonstrate that a cross-appeal stands on its own as an independent appeal. The rules do not stipulate any restriction as to the subject matter of complaint that may be brought by way of cross-appeal so long as it relates to the decision under appeal.

[13] At the outset it would be appropriate that we reproduce in full the provisions of r. 5 and r. 8 of the RCA 1994 to show the distinction between a notice of appeal and a notice of cross-appeal. These are as follows:

PART I

Appeals

5. Appeal to be by re-hearing on notice

(1) Appeals to the Court shall be by way of re-hearing and shall be brought by giving notice of appeal.

(2) Security for costs shall be given as provided in rule 17.

(3) A notice of appeal shall substantially be in Form 1 in the First Schedule.

(4) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only and what part, of the judgment or order is complained of.

PART II

Notice and Memorandum of Appeal

8. Notice of cross-appeal.

(1) It shall not be necessary for a respondent to give notice of appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the High Court should be varied, he may, at any time after entry of the appeal and not more than ten days after the service on him of the record of appeal, give notice of cross-appeal specifying the grounds thereof, to the appellant and any other party who may be affected by such notice, and shall file within the like period a copy of such notice, accompanied by copies thereof for the use of each of the Judges of the Court.

(2) Notice of cross-appeal shall be substantially in Form 2 in the First Schedule.

(3) If the respondent fails to give such notice within the time prescribed, he shall not be allowed, except by leave of the Court, to contend on the hearing of the appeal that the decision of the High Court should be varied; but the Court may in its discretion hear any such contention and may, if it thinks fit, impose terms as to costs, adjournment or otherwise.

[14] As regards the first question posed before this court as to whether a notice of cross-appeal may only raise contentions to vary the decision of the High Court, we are of the view that r. 8 and Form 2 of the RCA 1994 are relevant consideration.

[15] In construing r. 8 and Form 2 of the RCA 1994, the Court of Appeal had rightly considered the critical words used, namely "should be varied ... specifying the grounds thereof" and "to be varied to the extent". Following

this, the Court of Appeal had rightly held that the word "vary" by itself should be given its ordinary and natural meaning as stated in *The Concise Oxford Dictionary* to mean "change, make different, modify".

[16] We also agree with the Court of Appeal's finding that it had considered the clear provisions under r. 5 of the RCA 1994, and holding that r. 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a re-hearing. The word "re-hearing" used clearly anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence, if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal.

[17] We noted that the Court of Appeal's decision on the issues raised in the present appeal has been recently followed by another panel of the Court of Appeal in the case of *Pengerusi Suruhanjaya Pilihanraya Malaysia v. See Chee How & Anor* [2015] 8 CLJ 367 wherein Abdul Rahman Sebli JCA had this to say:

> [81] In the appeal before us, the High Court's refusal to grant prayers (a) and (b) of the application is a decision that is adverse to the respondents and appealable at their instance. The respondents should have filed a separate notice of appeal if they wanted the decision to be reversed or set aside and not by filing a cross-appeal as was done in this case.

[18] It is our considered view that since the High Court found that a valid and binding agreement was concluded between the plaintiff and the first defendant and such a finding being adverse against the first defendant, the first defendant should have filed a separate notice of appeal ie, if the first defendant wanted the aforesaid decision to be reversed or set aside.

[19] Useful reference can also be made to the provision of s. 67(1) of the Courts of Judicature Act 1964 ("CJA 1964") which provides as follows:

> 67. Jurisdiction to hear and determine civil appeals
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

[20] We are of the view that s. 67(1) of the CJA 1964 clearly provides that a litigant has the right of appeal to appeal against "any judgment or order of any High Court". It is therefore trite that such an appeal must be filed pursuant to r. 5 of the RCA 1994.

[21] It is not disputed that the first defendant is entitled to have a "re-hearing" of the case before the Court of Appeal by way of a notice of appeal. It is our judgment, given the fact that the first defendant had not filed a separate notice of appeal, the plaintiff therefore had rightly raised a preliminary objection against the first defendant's cross-appeal which is recast as an appeal in itself to set aside the judgment of the High Court.

[22] On the second and third questions posed before this court we take the view that the first defendant ought to have filed an independent notice of appeal as a notice of cross-appeal does not provide for a complaint to be re-heard.

[23] We are of the view that under r. 8 of the RCA 1994 the first defendant cannot set aside the substantive finding of facts made by the High Court by way of notice of cross-appeal. The first defendant may only set aside the substantive findings of the High Court by way of filing a notice of appeal under r. 5 of the RCA 1994. Only an appeal by way of a notice of appeal constitutes a re-hearing. Rule 8 of the RCA 1994 does not state that a notice of cross-appeal "… shall be by way of re-hearing". Rule 8 of the RCA 1994 only provides that a respondent could only contend that the decision of the High Court should be varied if the respondent files the notice of cross-appeal within ten days after the service of the record of appeal.

[24] We also noted by way of comparison that the RCA 1994 clearly provides that a notice of appeal under Part 1 Chap 2 on civil appeal is distinct and distinguishable from a notice of cross-appeal under Part II of the same chapter two of the RCA 1994.

[25] Under r. 5(2) of the RCA 1994 an appellant is required to lodge a deposit of RM1,000 pursuant to r. 17 of the RCA 1994 for the purpose of filing of the notice of appeal. Under r. 8 of the RCA 1994 it does not require the respondent to lodge any deposit for the filing of the notice of cross-appeal.

[26] The notice of appeal filed by the appellant shall comply with Form 1, which contains the words "being dissatisfied with the decision(s)" of the judge. On the other hand the notice of cross-appeal shall comply with form 2, which contains the words of "will contend that the decision(s)" of the judge "ought to be varied to the extent and on the grounds hereinafter set out."

[27] Under Form 1 and r. 5(4) of the RCA 1994, it further require that the appellant should specify as to whether the appellant is appealing against (i) the whole of the decision or order, or (ii) such part only of the decision or order whilst under Form 2 and r. 8 of the RCA 1994 the respondent is merely required to set out: (i) the nature of the relief claimed; and (ii) the grounds relied upon; for the purpose of varying the decision of the judge.

[28] Learned counsel for the first defendant submitted that the approach taken by the Court of Appeal in *Sumarni v. Yow Bing Kwong & Anor* [2008] 3 CLJ 489 states the law on cross-appeals correctly and should be preferred rather than the narrow and rigid approach taken by the Court of Appeal in the present case.

[29] In *Sumarni*, when construing O. 53 r. 3 of the RHC 1980 (now preserved under O. 55 r. 8 of the Rules of Court 2012) which provision is in *pari materia* with r. 8 of the RCA 1994, Abdul Hamid Embong JCA (as he then was) observed:

> As for the preliminary objection raised by the defendants that this appeal by the plaintiff should have been filed and heard separately, and not as was done here, filed as a cross-appeal and heard simultaneously with the defendants' appeal on liability, I find no flaw arising from the action taken by the plaintiff to file a cross-appeal. As was explained by learned counsel for the plaintiff, the defendants had earlier filed an appeal against the finding of liability by the learned sessions judge, even before the plaintiff could file her appeal on the quantum awarded. Under that situation the plaintiff may rightly act under O. 55 r 3 of the Rules of High Court 1980 and file a cross-appeal within seven days, which was duly done. *In essence a cross-appeal although tagged to the defendants' initial appeal operate as an independent appeal and the appellate court may rehear both appeals together. In fact to file a cross-appeal under O. 55 r. 3 of the Rules of High Court 1980 as was done by the plaintiff here was quite regular and ultimately be a time and cost saving exercise. The objection taken by the defendants on this matter is thus without merit and should be dismissed.* (emphasis added)

[30] With respect we find the decision in *Sumarni* may be distinguished on the facts with the present case. The notice of cross-appeal addressed in *Sumarni* originated from the subordinate court to the High Court. The decision in *Sumarni* pertains to the interpretation of O. 53 r. 3 of the RHC 1980. There is no equivalent provision in the RHC 1980 of rr. 5, 7, 8 and 10 of the RCA 1994. Moreover the point argued in the present appeal was not canvassed before the court in *Sumarni*.

[31] The Court of Appeal in the present case had rightly applied the principle enunciated in the English case of *Re Cavender's Trusts* (1881) 16 Ch D 270 which states that an appeal on a point which does not affect the original appellant cannot be by a cross-appeal. In other words, where the respondent wishes to raise matters which are unconnected with the substance of the appeal by the appellant the respondent must proceed by way of a separate notice of appeal.

[32] The principle enunciated in *Re Cavender's Trusts* has been widely referred with approval across the Commonwealth jurisdiction. In the New Zealand's case of *In re Parker (Deceased) Crow v. Weston* [1948] NZLR 9 at pp. 11-12 the Court of Appeal in Wellington held that:

A The cross-notices on appeal are accordingly out of time: R 6 of the Court of Appeal Rules; and see ***Re Cavander's Trusts.*** **Each could be good as a cross-appeal only with regard to a point already in issue in a validly-existing appeal**. The cross-notice on appeal is not of itself sufficient to set an appeal on foot, as it derives its validity from the appeal. All the parties were aware of the facts, and should have been on their guard; and they B should have protected themselves by one of them giving formal notice, of appeal when a respondent has given notice and the appellant withdraws a validly-existing appeal, the respondent may elect to proceed with or to withdraw his notice: The **Beewing**; but here there is no validly-existing appeal If the cross notices were in time and held to be good even though the appeal was bad, and the appellant were still allowed to proceed C on such cross-notices under R 6 (as to which there is no time-limit), this would render nugatory the whole purpose and effect of R 19. The notice under R 6 is only effective as to matter raised by the appeal itself, and **if any matter is to be raised by the respondent on appeal that is not in issue as a result of the appellant's notice of appeal: a substantive appeal** D **must be lodged by such respondent**. (emphasis added)

[33] In the case of *Alati v. Kruger* - BC5500350 the High Court of Australia applied the case of *Re Cavender's Trusts* and held that:

It was not open to him to pursue either object by way of cross-appeal, for the appellant had no interest in the points involved: *Re Cavander's Trusts* E [1881] 16 Ch D 270.

[34] In India, the case of *Re Cavender's Trusts* was applied with approval in the case of *Vadlamudi VenkateswaHu & Anor v. Ravipati Ramamma & Anor* AIR 1950 MAD 379; *Rex v. Lee Ah Phua & Ors* [1950] 1 LNS 74; (1950) 1 MLJ 54 wherein the High Court of Madras held that:

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[17] Dealing with a similar provision, namely, O. 58 r. 6 of the rules of the Supreme Court 1875, Jessel MR. said in *Re Cavander's Trusts*, (1881) 16 Ch. D 270: (50 L.J. ch. 292), 'the terms of the latter part of this rule are very wide but looking at the former part it is evident that it was only intended to make the notice a substitute for a cross appeal and an appeal G on a point which does not affect the original appellant cannot be a cross appeal. The notice may affect other parties also, and it so, it must be served upon them, but it cannot have been intended to enable a respondent to bring forward in this way a case with which the appellant has nothing to do.

H **[35]** We noted in the present case that the High Court in its decision had made a finding that there was in existence a valid contract between the plaintiff and the first defendant. The orders of the High Court that the first defendant pay damages *in lieu* of specific performance was the result of the principal finding that there was a binding contract between the plaintiff and the first defendant. As for the plaintiff, its appeal was only brought against I a part of the decision of the High Court in ordering the first defendant to pay damages instead of granting specific performance.

[36] It would appear that none of the parties in this case appealed against the entire decision of the High Court. The first defendant had failed to appeal against the finding of the High Court that the HK MOU was a binding contract. The High Court's decision that there was a valid and binding agreement concluded between the plaintiff and the first defendant is adverse against the first defendant. It was thus incumbent on the first defendant to file a separate notice of appeal if it wanted the aforesaid decision to be reversed or set aside, rather than by filing a notice of cross-appeal. The operative words of "to contend" and "decision of the High Court should be varied" under r. 8(1) of the RCA 1994 clearly limits the contentions under a notice of cross-appeal to effectively vary a decision, not set aside a judgment or order. It is incumbent on the first defendant to independently file a notice of appeal under r. 5 of the RCA 1994 to rehear the issues that were not decided in the first defendant's favour. A notice of cross-appeal does not provide for a complaint to be re-heard. The first defendant is at liberty to file an independent appeal under s. 67(1) of the CJA 1964.

Conclusion

[37] For the reasons abovestated we find that there is no merit in this appeal. The first defendant's appeal is therefore dismissed with costs.